



Federal Communications Commission

DA 02-3360

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 73.202(b)
Table of Allotments,
FM Broadcast Stations.
(Douglas and Tombstone, Arizona
and Santa Clara, New Mexico)

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MB Docket No. 02-374
RM-10598

**NOTICE OF PROPOSED RULE MAKING
AND
ORDER TO SHOW CAUSE**

Adopted: December 4, 2002**Released: December 9, 2002****Comment Date: January 30, 2003****Reply Comment Date: February 14, 2003**

By the Assistant Chief, Audio Division:

1. The Audio Division considers herein a petition for rule making filed on behalf of Cochise Broadcasting, LLC ("Petitioner"). licensee of Station KCDQ,¹ Channel 237A, Douglas, Arizona, requesting the substitution of Channel 237C for Channel 237A at Douglas, the reallocation of Channel 237C to Tombstone, Arizona, as its first local aural service, and modification of its authorization accordingly. In order to accommodate its proposal in conformity with the minimum distance separation requirements set forth in Section 73.207(b) of the Commission's Rules, petitioner also requests the substitution of Channel 236C1 for Channel 237C1 at Santa Clara, New Mexico, at the current transmitter site of Station KNUW(FM), and modification of the license accordingly to specify the alternate Class C1 channel. In accordance with petitioner's request we will issue an **Order to Show Cause** to the licensee of Station KNUW(FM) at Santa Clara. Petitioner states that if the Commission approves the reallocation of Channel 237C to Tombstone, Arizona, it will apply for the channel and construct the facility if authorized, and reimburse the licensee of Station KNUW(FM) for the reasonable and prudent costs associated with the requested change in its operating channel.

2. Petitioner seeks to invoke the provisions of Section 1.420(i) of the Commission's Rules which permits the modification of a station's authorization to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest.² The proposed allotment of Channel 237C at Tombstone, Arizona, is mutually exclusive with the current allotment of Channel 237A at Douglas. The communities are located **64.2** kilometers apart, while the Commission's Rules requires a separation of 226 kilometers in this instance.³ In further support of the proposal, Petitioner

¹ Formerly Station KEAL.

² See *Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989) ("Change of Community R&O"), *recon. granted in part*, 5 FCC Rcd 7094 (1990) ("Change of Community MO&O").

³ Coordinates at the licensed site of Station KCDQ, Douglas, Arizona, are 31-22-08 NL and 109-31-45 WL;

avers that adoption of its proposal will result in a preferential arrangement of allotments consistent with the *Revision of FM Assignment Policies and Procedures*.⁴ According to Petitioner, the reallocation will provide Tombstone, with a population of 1,504 persons,⁵ with its first local transmission service (priority three), and will not deprive Douglas, with a population of 14,312, of local service (priority four).⁶

3. In further support of its proposal, Petitioner advises that Tombstone has its own post office and zip code (85638). Further, we are advised that Tombstone's government functions independently of any other governmental units. It has an elected mayor and city council members. City government services include police, local planning and zoning, permit issuance, road maintenance, sewer and water. The Tombstone volunteer fire department offers fire, rescue, EMS, and other services to the citizens of the community. Further, there are numerous businesses that identify with the community by using Tombstone in their names. Additionally, many lodging and dining establishments, medical services, and a municipal airport are located in Tombstone. The community also has schools, churches, a Lions Club, medical services, and the Tombstone Repertory Theater. Petitioner concludes that Tombstone is a community for allotment purposes and deserves its own radio station. In consideration of the foregoing, we agree that Tombstone is a community entitled to an FM allotment.

4. The transmitter site for Station KCDQ must be relocated to accommodate the reallocation request at Tombstone, and therefore, gain and loss areas will be created. Petitioner advises that from the transmitter site identified in its technical analysis at coordinates 31-49-00 NL and 110-05-30 WL, the proposed 60 dBu contour of Station KCDQ will provide service to 543,713 persons. The existing Class A facility at Douglas provides service to 22,104 persons, and according to petitioner, its reallocation proposal would result in a net gain in population of 521,609 persons. Petitioner reports that the loss area will be served by several aural services.

5. Further, Petitioner advises that the requested use of Channel 237C from its proposed transmitter site at Tombstone would also be short-spaced to Channel 237C (vacant), Caborca, Sonora, Mexico, and to Channel 239B (vacant), Santa Cruz, Sonora, Mexico. However, as Petitioner notes that such short spaced proposals are entertained as specially negotiated allotments, provided contour protection is afforded toward

coordinates at the proposed transmitter site at Tombstone, Arizona, are 31-49-00 NL and 110-05-30 WL.

⁴ *Revision of FM Assignment Policies and Procedures* ("FM Priorities"), 90 FCC 2d 88 (1982). The allotment priorities are: (1) first full-time aural service; (2) second full-time aural service; (3) first local service; and (4) other public interest matters. (Co-equal weight is given to priorities (2) and (3).)

⁵ Population figures reported herein were taken from the 2000 U.S. Census.

⁶ Douglas will continue to receive local service from noncommercial educational Station KRMC(FM), (Channel 219B1), as well as Station KDAP-FM (Channel 243A), and AM Stations KDAP and KAPR.

⁷ Petition for rule making. Exhibit A.

⁸ See, e.g., *Gualala, California*, 5 FCC Rcd 6268 (1990).

the affected facility or allotment. In this instance, petitioner advises that if Channel 237C is allotted to Tombstone, Station KCDQ would accept restricted facilities towards the vacant Mexican allotments.'

6. A staff engineering analysis reveals that between the present Class A facilities of Station KCDQ at Douglas and the proposed modification and reallocation of Channel 237C to Tombstone, the approximate gain area on US territory is 18,321 square kilometers with a US population of 271,500 persons. Also within the gain region, an area of 1,476 square kilometers with a population of 1,863 receives no aural service (white area) (priority one); an area of 2,443 square kilometers with 814 persons receives one aural service (gray area) (priority two); an area of 2,333 square kilometers with a population of 46,163 persons receives two aural services; an area of 2,694 persons with a population of 27,888 persons receives three aural services; and an area of 1,859 square kilometers with a population of 3,567 persons receives four aural services. The balance of the gain areas and population receives five or more aural services and are considered to be well served." The loss area within US territory is 194.1 square kilometers and has no population.

7. Additionally, our engineering analysis reveals that Channel 237C can be allotted at Tombstone at the petitioner's requested site located 11.8 kilometers (7.3 miles) north of the community, utilizing coordinates 31-49-00 NL and 110-05-30 WL. However, Mexican concurrence must be obtained for Channel 237C at Tombstone as a specially negotiated, restricted allotment towards vacant Channel 237C at Caborca, and to vacant Channel 239B at Santa Cruz, Sonora, Mexico. Further, Channel 236C1 can be substituted for Channel 237C1 at Santa Clara, New Mexico, at the licensed site of Station KNUW at coordinates 32-51-47 NL and 108-14-28 WL. The Mexican government will also be notified of the requested channel substitution at Santa Clara, New Mexico. at the currently authorized site for Station KNUW(FM).¹²

8. Based on the foregoing we believe petitioner's proposal warrants consideration since the allotment of Channel 237C at Tombstone would provide service to white and gray areas (priorities 1 and 2), as well as a first local transmission service to the community (priority 3). Additionally, the proposed upgrade and reallocation will enable Station KCDQ to expand its service area. The petitioner's proposal is

⁹ Petitioner advises that if Channel 237C is allotted at Tombstone, Station KCDQ would be limited to 3.25 kW ERP at 741 meters HAAT on the 238 degree radial to provide equivalent protection to the allocation of Channel 237C at Caborca. With regard to the allocation of Channel 239B at Santa Cruz, the KCDQ facility would be limited to an ERP of 25.6 kW at 708 meters HAAT on the 217 degree radial.

¹⁰ A white area refers to a geographical area in which there are no full-time aural reception services. A gray area is one that is served by one full-time aural reception service only.

¹¹ See *La Grange and Rollingwood, Texas*, 10 FCC Rcd 3337 (1995). See also *Family Broadcasting Group*, 53 RR 2d 662 (Rev. Bd. 1983), *rev. denied* FCC 83-559 (Nov. 29, 1983) [The Commission has considered five or more reception services to be "abundant"].

¹² Coordinates at the licensed site of Station KNUW(FM), Santa Clara, New Mexico are 32-51-47 NL and 108-14-28 WL.

consistent with the provisions of Section 1.420(i) of the Commission's Rules. Therefore, we shall propose to modify the license of Station KCDQ, ~~as~~ requested, without entertaining competing expressions of interest in the use of Channel 237C at Tombstone, Arizona, or requiring petitioner to demonstrate the availability of an additional equivalent channel for use by other parties.

9. Whenever an existing licensee or permittee is ordered to change frequencies to accommodate a new channel allotment, Commission policy requires the benefiting party, or parties, to reimburse the affected station for costs incurred." Petitioner has stated its willingness to reimburse the licensee of Station KNUW for reasonable costs associated with changing to Channel 236C1. Therefore, we are issuing an **Order to Show Cause** to Mel-Mike Enterprises, Inc., licensee of Station KNUW, Santa Clara, New Mexico, to show why its license should not be modified as proposed.

10. Accordingly, we seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the communities listed below, as follows:

<u>City</u>	<u>Channel No.</u>	
	<u>Present</u>	<u>Proposed</u>
Douglas, Arizona	237A, 243A	243A
Tombstone, Arizona	--	237C
Santa Clara, New Mexico	237C1	236C1

11. Accordingly, **IT IS ORDERED**, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Mel-Mike Enterprises, Inc., licensee of Station KNUW(FM), SHALL SHOW CAUSE why its license SHOULD NOT BE MODIFIED to specify operation on Channel 236C1 instead of Channel 237C1.

12. Pursuant to Section 1.87 of the Commission's Rules, Mel-Mike Enterprises, Inc. may, not later than January 30, 2003, file a written statement showing with particularity why its license (File No. BLH-19960625KB) should not be modified as proposed in this **Order to Show Cause**. The Commission may call on Mel-Mike Enterprises, Inc. to furnish additional information. If Mel-Mike Enterprises Inc. raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished the Commission may grant or deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referenced above, Mel-Mike Enterprises, Inc. will be deemed to have consented to the modification as proposed in this **Order to Show Cause** and a final **Order** will be issued by the Commission, if the channel modification is found to be in the public interest.

13. **IT IS FURTHER ORDERED**, That the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this **Order to Show Cause** by Certified Mail, Return Receipt Requested, to the licensee of Station KNUW, Santa Clara, New Mexico, as follows:

¹³ See *Circleville, Ohio*, 8 FCC 2d 159 (1967).

Mel-Mike Enterprises, Inc
106 South Bullard Street
Silver City, NM 88061

14. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest **is** required by paragraph 2 of the Appendix before a channel will be allotted.

15. Pursuant to Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before January 30, 2003, and reply comments on or before February 14, 2003, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Federal Communications Commission, Office of the Secretary, 445 12th Street, **SW**; TW-A325, Washington, D.C. 10554. Additionally, a copy of such comments should be served **on** the petitioner's counsel, as follows:

Mark N. Lipp, Esq.
Shook, Hardy and Bacon
600 14th Street, NW
Suite 800
Washington, DC 20005

16. Parties who chose to file by paper must file **an** original and four copies **of** each filing. Filings may be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight **U.S.** Postal Service mail (although we continue to experience delays **in** receiving **U.S.** Postal Service mail). The Commission's contractor, Vistrionix, Inc., will receive hand-delivered or messenger-delivered paper filings for **the** Commission's Secretary at 236 Massachusetts Avenue, **N.E.**, Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. **All** hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail or Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, **SW.**, Washington, D.C. 20554. **All** filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

17. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules.¹⁴

18. For further information concerning this proceeding, contact Nancy Joyner, Media Bureau,

¹⁴ See Certification **that** Sections 603 and 604 of **the** Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981.

(202) 118-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment, which has not been served on the petitioner, constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment that has not been served on the person(s) who filed the comment to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Assistant Chief, Audio Division
Media Bureau

Attachment: Appendix

APPENDIX

1. Pursuant to authority contained in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, **IT IS PROPOSED TO AMEND** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Norice of Proposed Rule Making* to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal discussed in the *Norice of Proposed Rule Making* to which this Appendix is attached. Proponent will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off Procedures. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They **will** not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal in this *Norice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Norice of Proposed Rule Making* to which this Appendix is attached. **All** submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, ³⁰ one original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission,

6. Public Inspection of Filings. All filings made in this proceeding **will** be available for examination **by** interested parties during regular business hours in the Commission's Reference Information Center (Room CY-A257), at its headquarters, 445 Twelfth Street, **SW.**, Washington, **D.C.**